SHAWN MONTEE, INC., dba SHAWN MONTEE TIMBER COMPANY,	)	**AGBCA Nos. 2004-153-R**
	)	**2004-154-R**
	)	**2004-155-R**
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	)	**2004-157-R**
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DECISION AND ORDER OF THE BOARD OF CONTRACT APPEALS

February 16, 2005

BEFORE POLLACK, VERGILIO, and WESTBROOK, Administrative Judges.

PER CURIAM[1]

[1]Although JudgeVergilio concurs that statutes authorize this Board to issue the order requested (a board can provide relief available at the Court of Federal Claims; such relief includes certifying a question for review), he would not do so. 28 U.S.C. § 1292(d)(2) (2000); 41 U.S.C. § 607(d); see AAA Engineering & Drafting, Inc. v. Widnall, 129 F.3d 602 fn* (Fed. Cir. 1997). He

concludes that there is not a substantial ground for difference of opinion regarding the question posited ("Whether contract clause C[T]6.01 limits the Forest Service's liability for suspensions caused by its own failure to meet its preaward environmental obligations."). When examined in light of existing case law authority and the analyses deducible therefrom, the clause limits liability, absent a breach of the contract; the issuance of an injunction, based upon errors pre-award, does not signify a per se breach of the contract.

On November 4, 2004, Appellant filed a Motion for Order Certifying a Question of Law for an Interlocutory Appeal involving the Board's ruling denying the Appellant's Motion for Summary Judgment in Shawn Montee, Inc. d/b/a/ Shawn Montee Timber Co., AGBCA Nos. 2003-132-1, et al, 04-2 BCA ¶ 32,564 and Motion for Reconsideration, AGBCA Nos. 2004-153-R, et al, 04-2 BCA ¶ 32,755. In the decision on the Motion for Summary Judgment and on the Motion for Reconsideration, the Board ruled that contract clause C6.01 (or similar CT6.01) could be used by the Forest Service (FS), as a basis for suspension of a contract, even where the cause of the suspension was due to a pre-award error or wrongful action in performing environmental processing by the FS. In its Motion for Reconsideration, Appellant focused on what it contended was Board error in relying on Scott Timber, Co. v. United States, 333 F.3d 1358 (Fed. Cir. 2003), distinguishing Scott from the instant appeal. In our ruling on reconsideration, we stated, as follows, in regard to Appellant's contention:

> We recognize that Scott concerned arguments dealing with the reasonableness of the length of a suspension and did not get into arguments regarding breach per se or reasonableness of the suspension itself.

We also reiterated that we read C6.01 to allow the FS to suspend, even if the cause of the court order relied upon by the FS for justifying that suspension, was due to FS actions found by a court to not be in compliance with the FS properly carrying out its environmental obligations. We found that it was not legally necessary for the clause to specifically say that it covered both fault and non-fault based suspensions, in order to apply.

Clause C6.01, the subject of Appellant's motion for this interlocutory order provides in pertinent part:

> C6.01-INTERRUPTION OR DELAY OF OPERATIONS (10/96) Purchaser agrees to interrupt or delay operations under this contract, in whole or in part, upon the written request of Contracting Officer:
>
> (a) To prevent serious environmental degradation or resource damage that may require contract modification under C8.3 or termination pursuant to C8.2;
>
> (b) To comply with a court order, issued by a court of competent jurisdiction; or

Appellant sets out its understanding of the Board's position stating, "the Board has now made it clear that C6.01 may permit the Forest Service to suspend a contractor's operations with only limited liability, even where the root cause of the suspension is one or more errors by the Forest Service in meeting its pre-award obligations, and the court has concluded that such errors are sufficiently grave to require the issuance of an injunction by a district court against the Forest Services's proceeding with the contract." Appellant says the Board is incorrect and asserts that the law of the Federal Circuit requires that if a contract provision is to limit a party's liability for errors that have a significant adverse impact on the other party's performance, the provision must, at a minimum, do so expressly, citing United States v. Seckinger, 397 U.S. 203 (1970). The clause in issue, C6.01

contains no specific language stating that it covers both fault and non-fault based errors. Appellant asserts that it is the law of the circuit that a limitation of liability clause does not extend to situations where the breach arises out of the events within the government's control, citing C. J. Bettors Corp. v. United States, 25 Cl. Ct. 674, 677 (1992); quoting Koppers/Clough v. United States, 201 Ct. Cl. 344, 363 (1973) and Precision Pine & Timber, Inc. v. United States, 50 Fed. Cl. 35, 66 (2001).

Appellant then asks that the Board certify the following question:

> Whether the contract clause C[T]6.01 limits the Forest Service's liability for suspension caused by its own failure to meet its pre-award environmental obligations.

If the Court of Appeals takes the question and concludes that the clause does not limit FS liability, it would likely follow, absent introduction of some other argument, that there would be no other contractual clause to justify the suspension. The Board would then look at the materiality of the FS actions, and other defenses; however, the appeal would no longer place the burden on the Appellant to demonstrate the unreasonableness test for failure to cooperate and hinder, as is the case now. A court decision, supporting the Appellant, would have a material impact on future proceedings.

The FS has opposed the Board's certifying the question. It does not challenge the Board's authority to certify but rather challenges the merits of the interpretation, expresses concerns that the Board's opinion was not final, and asserts that any decision by the court would only be advisory. We do not find the FS arguments convincing. The FS has not in fact, specifically addressed the criteria set out in the Federal Rules. As to the FS's specific concerns, any court decision on the meaning of the clause will be binding on us. Such a decision will likely shorten the proceeding and save both parties and the Board, considerable expense. Additionally, and of great importance, the purchaser maintains that a court determination will also impact three other cases presently at the Board, where the same clause is at issue.

When Appellant filed this motion, it contended that the Board has the authority to certify a question under 28 U.S.C. §1292(c). Other boards of contract appeals have concluded that boards lack authority to certify a question. In Freightliner Corp., ASBCA No. 42982, 94-2 BCA ¶ 26,705, the ASBCA declined to certify a matter, stating that it was denying the motion because 28 U.S.C. §1292(b) by its terms is applicable to the district courts, not boards of contract appeals and stating that it knew of no other authority for an interlocutory appeal. The ASBCA, however, provided little additional analysis. Other boards have similarly refused to certify a question. Carlin-Atlas, GSBCA No. 6567, 83-2 BCA ¶ 16,857; Marshall Associated Contractors, Inc., IBCA Nos. 1901 et al., 98-1 BCA ¶ 29,565 at 146,561-15; City of Burbank, EBCA Nos. C-0303364 et al, 04-1 BCA 32,513. We have examined those decisions and find they are generally characterized by a sparse legal analysis or in some cases, such as Baeten Constr. Co., GSBCA No. 6976, 83-2 BCA ¶ 16,753, by a reference to seemingly inapplicable case law. Cases presented to the Federal Circuit, as interlocutory appeals without a certified question, are distinguishable.

We find that we have authority to certify a question to the Court of Appeals. The Federal Rules provide at 28 U.S.C. § 1292 (a) and (b) that Federal Courts of Appeals can hear interlocutory appeals from district courts. The rules then provide at (c), the following regarding the Court of Appeals for the Federal Circuit:

> (c) the United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction;
>
> > (1) of an appeal from an interlocutory order or decree described in subsection (a) or (b) of this section in any case over which the court would have jurisdiction of an appeal under section 1295 of this tittle;

The Rules provide at 28 U.S.C. § 1295 that the United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction:

> (a)(10) of an appeal from a final decision of an agency board of contract appeals pursuant to section 8(g)(1) of the Contract Disputes Act of 1978 (41 U.S.C. 607 (g)).

Since the Federal Circuit has jurisdiction over board matters pursuant to 28 U.S.C. § 1295(a)(10) and it has jurisdiction over an interlocutory order emanating from a case where it has jurisdiction, it follows, that an interlocutory appeal from a board can be certified to the Federal Circuit. The fact that the federal rules reference district judges in § 1292(b) does not in our view change that. We would not expect the federal rules to reference board judges or address specifically each tribunal over which the Court of Appeals for the Federal Circuit has jurisdiction. We additionally point out, although dealing with a somewhat different situation (protest from the GSBCA), that the Court of Appeals found in Electronic Data Systems v. General Services Administration Board of Contract Appeals, 792 F.2d 1569 (Fed. Cir. 1986), that the status of the Board, as one over which the court had general jurisdiction, made appropriate the use of consideration of an interlocutory appeal.

Additional authority derives from 28 U.S.C. § 1292(d) (2) and the Contract Disputes Act of 1978, 41 U.S.C. § 607(d) (CDA). The former addresses the issuance of an interlocutory order by the Court of Federal Claims, including those involving a controlling issue of law. The statement in the rule that a controlling issue of law is involved, permits a litigant to seek (although not necessarily obtain) review and relief from the Federal Circuit, so as to materially advance the ultimate termination of the litigation. That authority needs to be read in conjunction with following language from the CDA which states:

> (d) Each agency board shall have jurisdiction to decide any appeal from a decision of a contracting officer (1) relative to a contract made by its agency. . . . In exercising this jurisdiction, the agency board is authorized to grant any relief that would be available to a litigant asserting a contract claim in the United States Court of Federal Claims.

A litigant at the Court of Federal Claims can specifically avail itself of the opportunity to ask the court to certify a question. Following the plain language of the CDA, there should be no impediment to a litigant obtaining that same relief at a board. While we recognize that we are different from the Court of Federal Claims and do not hold ourselves out as a court, boards, by statute, are empowered to provide the same relief as the court. Moreover, the boards were established under the CDA to provide a forum for economical and expeditious resolution. To bar the boards from engaging in a process aimed at moving a matter forward for purposes of faster termination of the proceeding, while allowing the Court of Federal Claims to so proceed, in a similar case, would undermine the plain language and intent of the CDA.

To certify a question for interlocutory appeal, the Federal Rules and court decisions look at the criteria set out in Title 28, § 1292(b) and as to the Court of Federal Claims, § 1292(d)(2). To qualify for certification, the issue presented must address a controlling question of law with respect to which there is a substantial ground for difference of opinion. In addition, an immediate appeal from that order must materially advance the ultimate termination of the litigation. Under those circumstances, the United States Court of Appeals for the Federal Circuit may, at its discretion, permit an appeal to be taken from such an order.

The question we certify is a matter of contract interpretation, thus a matter of law. The question posits whether clause C6.01 applies to suspensions due to pre-award fault or error of the FS. As the case presently stands, Appellant must prove that the actions of the FS pre-award were so unreasonable, notwithstanding the coverage of C6.01, such that those actions constituted a breach of the FS duty to cooperate and not hinder. If the court rules in the manner Appellant seeks, then C6.01 is not applicable and this clause does not give the FS the right to suspend. This would be controlling in this appeal because it would change the way the parties would engage in trial preparation and in litigation. It would have a dramatic effect on discovery if the parties no longer need to focus on the allegedly unreasonable nature of the FS act. This Board anticipates in this appeal, as well as in three others involving the same clause, that it will have to deal with a myriad of issues on discovery involving deliberative process and attorney-client matters. Mountain Valley Lumber, Inc., AGBCA No. 2003-171-1; Viking Lumber Co., AGBCA No. 2002-122-1; Tamarack Mill LLC , AGBCA Nos. 2003-115-1 and 2003-116-1. Thus, discovery will not only involve the Department of Agriculture, but also other agencies, including the Department of Justice.

Another necessary criteria for certifying a question, is "whether there is substantial grounds for difference of opinion on the disputed question." As a threshold matter, by certifying this question, we do not in any way doubt the correctness of our decision as to C6.01. However, we do recognize that the specific issue, as to the applicability of the clause to a pre-award error has not been directly addressed by the Federal Circuit and its predecessor. There is no case where Appellant's position has been argued to a court. In cases where the clause has been in issue, the cases have focused primarily on the handling of the suspension. Appellant asserts that the law of the Circuit requires there be specific language as to fault, in order to protect an agency from its own errors. While we believe our understanding of the law is correct and that the language of the clause can only be read to cover both fault and non-fault based errors, Appellant has presented a competing argument that deserves final

resolution. We believe that resolving that now will serve to expedite the ultimate termination of the case.

The final test set out in the rules is whether the certification will materially advance the ultimate termination of the litigation. The meaning of C6.01 is the driving force in this appeal. If C6.01 does not provide a basis for suspension, then the FS will have to make serious adjustments to its defense. Such a holding will affect the need to prove unreasonableness in establishing a breach of failure to cooperate and not hinder. If the court rules as we expect that it will, then Appellant will be faced with reconsidering the likelihood of success.

In deciding to certify, we recognize that interlocutory relief is not a matter to be used lightly and should only be used in cases where the Board finds that all criteria are met and where absent the appeal, there is a strong possibility of unnecessary delay and expense or protracted and expensive litigation. In making the determination to certify, we have taken into account the impact on the three other cases. While we recognize that the question of law is not of the greatest magnitude, it is significant for purchasers and agencies engaging in timber contracting, where suspensions due to environmental matters are not uncommon.

DECISION

For the reasons set out above, the Board grants the Appellant's motion to amend the Board's opinion on reconsideration dated October 6, 2004, to certify for interlocutory appeal the following question:

> Whether the contract clause C[T]6.01 limits the Forest Service's liability for suspension caused by its own failure to meet its pre-award environmental obligations.

HOWARD A. POLLACK

Administrative Judge

ANNE W. WESTBROOK
Administrative Judge

JOSEPH A. VERGILIO
Administrative Judge

Issued at Washington, D.C.
February 16, 2005